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Electoral Abuse in PR Systems:  
Old and New Territorial Distortions  
in the German Electoral System

GIOVANNI CAPOCCIA

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**GIOVANNI CAPOCCIA**



**BADIA FIESOLANA, SAN DOMENICO (FI)**

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**ELECTORAL ABUSE IN PR SYSTEMS: OLD AND NEW TERRITORIAL  
DISTORTIONS IN THE GERMAN ELECTORAL SYSTEM**

Giovanni CAPOCCIA (European University Institute)

**Abstract**

Notwithstanding the essentially proportional nature of the German electoral system, the two-tier system of districts, and the complex counting procedure that it entails have rendered it liable to some of the consequences of a well-known form of "electoral abuse", malapportionment. Moreover, the division of the territory of application for the threshold of exclusion, introduced temporarily for the elections of December 1990, has given rise to other possible forms of electoral-territorial distortion, labelled here as "quasi-malapportionment" and "quasi-gerrymandering". These factors have had, in some cases, a remarkable political impact on German political life.

**Keywords:** proportional representation, electoral districts, Germany.



# ELECTORAL TERRITORIAL ABUSE IN PR SYSTEMS: MALAPPORTIONMENT AND GERRYMANDERING IN THE GERMAN ELECTORAL SYSTEM.\*

Giovanni Capoccia (EUI)\*

## INTRODUCTION - ELECTORAL ABUSES AND ELECTORAL SYSTEMS.

Under the label of "electoral abuses" (Taylor and Johnston 1979) two specific kinds of territorial distortions are indicated: gerrymandering and malapportionment. Although they are sometimes confused (Hacker 1960; Laqueur 1972), they actually refer to different phenomena.

Before discussing the German experience, some definitions are in order: firstly, by gerrymandering I mean the artificial geographical tailoring of electoral districts, aiming to favor —on the basis of the observation of the previous geographical distribution of votes— a given party; this allows it to exploit in the best possible way, through a careful redistribution of districts in the different geographical areas according to their prevalent political orientation, the votes that it will presumably obtain. By malapportionment, secondly, is simply meant the non-proportionality of the magnitude of a district vis a vis the number of its electors. That is, we have malapportionment in case of an (excessive) difference between the portion of the total seats which is to be assigned on the basis of votes cast in that district vis a vis the total number of seats, and the portion of population (electors) in that district vis

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European University Institute - Department of Social and Political Sciences - Via dei Roccettini, 9; I - 50016 SAN DOMENICO DI FIESOLE (FIRENZE) (e.mail:capoccia@datacomm.iue.it)



a vis the general population (electorate) (Taylor and Johnston 1979).

These phenomena are normally connected with majority systems more than with proportional ones, in the sense that the effects of gerrymandering are most strongly felt in a single-member constituency electoral system, and this decreases drastically with the increase in the magnitude of electoral districts; malapportionment, on the other hand, can always be found, except in a PR system with a single national district. This is why the conventional wisdom in the literature is that both gerrymandering and malapportionment are phenomena normally associated with majority systems, that malapportionment alone can be found in PR systems where the national territory is divided into districts, and that malapportionment is not possible when elections are conducted at large or with a nationwide upper tier (Lijphart 1994 and 1995).

The analysis of the German case is important for two reasons: first, it demonstrates that in a PR system, where seats are allocated in a single national district (constituting the "upper tier" of the German complex districting system), there can nevertheless be (and there has been) malapportionment; second, that the complex voting procedure, which entails a 5% threshold of exclusion, allows for another form of territorial electoral abuse to emerge when the territory of application of this threshold is manipulated, as happened in the 1990 elections.

The article is divided into three parts: after an introductory first section, the following two will be devoted respectively to why and how malapportionment can have an impact in the German representation process, and to the new forms of territorial distortion observable in the 1990 elections.

Before proceeding in the analysis, the question of the possible political impact of this kind of territorial

distortion of representation must be discussed. Since votes are actually counted –and seats are distributed– in a single national district, the impact of malapportionment in Germany is reduced in respect to majority systems. However, there is an impact, and this may have important political consequences.

Due to the complex mechanism of translating votes into seats (to be described in detail in the following section) the political impact of territorial electoral distortions in the German electoral system is basically given by the artificial creation of "excess mandates" (*Ueberschussmandate*) for a party. Such excess mandates (single-member seats that a party keeps if the proportionally allocated share of seats is inferior to the single-member mandates won in each region) were never more than a handful before 1990 (Ritter and Niehuss 1991). In the last two federal elections of 1990 and 1994, however, there were respectively six and sixteen excess mandates. In 1990, the excess mandates, all won by the Christian Democratic Union (CDU), did not change the political situation substantially, since the party had obtained a clear victory. In 1994, on the contrary, the exceptional result of sixteen excess mandates, of which twelve won by the CDU and four by the Social Democrats, brought the acceptability of this feature of the electoral law<sup>1</sup> into debate once more, and at the same time demonstrated the potential importance of this feature of the electoral system in force.

The political consequences of these excess mandates have been, in fact, remarkable indeed: without their twelve additional seats, the Christian-Liberal majority, which led Germany triumphantly through the complex process of national reunification, and is now pushing for the European monetary union, would have had only a two-seat majority in the *Bundestag*, which would have made the life of the cabinet much more difficult. With the allocation of excess mandates, on



the contrary, the same coalition has a majority of ten seats; this has without doubt rendered the task of Kohl's government less arduous.

Thus, the results of 1994 elections show that, although such a situation is exceptional, excess mandates can play an important political role. While there may be other causes of excess mandates, malapportionment is certainly the most significant of them (Jesse 1988; Capoccia 1995)<sup>2</sup>.

The focus of this article will be on malapportionment, since gerrymandering does not have a similar impact on the election results in the German electoral system. The article will proceed as follows: after a section devoted to the description of the complex mechanism of translation of votes into seats used in the German system, the following section will deal with the problem of how malapportionment can have an impact on the composition of the German Bundestag. Historical evidence, with reference to the 1961 elections, and to the subsequent intervention of the Federal Constitutional Court, will be provided.

The third section will then deal with a "new" form of territorial electoral abuse, stemming from the division of the territory of application of the 5% threshold in the 1990 federal elections (the first elections after the national reunification). This provision, however much it is justified by the exceptional circumstances of the first all-German elections, has had strong effects on what can be abstractly considered as the "fairness" of representation, based on the strict principle "one man, one vote", and must therefore be considered, at least formally, as an example of territorial electoral abuse.

### The German Electoral Procedure.

The German elector has two votes at his/her disposal, called respectively *Erststimme* (first vote) and *Zweitstimme* (second vote). The first vote is cast in a single-member district. The formula adopted in this district is that of the first-past-the-post. The national territory is divided into a number of districts amounting to half the total number of components of the Federal Assembly (*Bundestag*). The second vote is, on the contrary, a list vote. A list can be presented only by a party (a formation which meets the criteria defined by the law on political parties), and no intraparty preference is possible: the lists in question are "blocked", that is, the order in which candidates are elected depends on their position on the list. The party lists are presented in each *Land*, each one containing different candidates. The law allows a candidate to run in only one single-member district and in one single *Land*. However, the share of parliamentary seats to which a party is entitled is calculated exclusively on the basis of its share of the second votes, and this calculation is carried out in a single national district. That is to say, the second votes and the single national district are certainly among the most important features of the system.

The electoral formula on the basis of which seats are distributed is (and has been since 1985) the Hare-Niemeyer formula: the number of votes that a party obtains is multiplied by the total number of seats to be assigned. The result is then divided by the total number of valid votes to be considered. The most distinguishing feature of this part of the procedure is the threshold of exclusion, fixed at 5% of the national vote or to three direct mandates in single-member districts (from this parties representing national minorities are excluded). This means, in a nutshell, that the



denominator of the division which has been described above is not the total number of validly expressed votes, but the sum of votes of all those parties which obtain more than 5% of list votes at the national level. Thus, those parties which do not obtain this quota, or which, alternatively, do not win at least three mandates in the single-member districts, do not take part in the distribution of seats, and therefore their votes are discarded in the calculation.

Going back to the Hare-Niemeyer procedure, the "entire" unit resulting from the calculation gives the number of parliamentary seats to which a party is entitled. Unassigned seats are given to those lists which have in turn the highest decimal number in their figure. At this stage, the party composition of the *Bundestag* is almost entirely decided. The electoral procedure, however, does not stop here. In the following steps, dealing mainly with the *personal* composition of the *Bundestag*, and of which a brief description will follow, these results might in fact be corrected by the occurrence of some "excess mandates".

Once the number of seats to which each party is entitled has been established, this has to be divided between the different *Landeslisten* (translatable as "regional lists") that each party has presented in the different regions (*Laender*). In this second phase of the procedure, the regional lists of each single party "compete" to obtain a share of the total of the seats assigned to the party after the first phase of the calculation. The formula, for this step of the procedure, is again the Hare-Niemeyer. That is to say: to establish how many seats of those assigned to the party X at the national level must be given to the candidates presented by the party in question on its regional list for the region Alpha, the following mathematical operation is carried out: the result of the multiplication of the number of votes obtained by the regional list Alpha times the number of seats to which party X is entitled at the national level,

is divided by the number of votes that party X has obtained over the whole national territory. The entire unit of the resulting figure determines the number of seats to which the regional list Alpha is entitled, out of the whole amount obtained by the party X. Any eventually remaining seats are assigned according to the above-described procedure (that is, to regional lists with the highest decimal results, in succession).

This is the way in which the number of seats to go to each regional list of each party is determined. From this number, in each region the number of directly elected candidates (in the single-member districts) must be detracted. Those who win a seat in a single-member district are in any case elected to the Parliament. The remaining seats are given, in each region, to those on the list, according to their positions. If a candidate on a list has already been elected in a single-member district, then his/her name is skipped, and the candidate placed immediately below him/her on the list is elected.

It has happened that several times in the past (and more evidently, as has been mentioned, in the last two elections held in 1990 and 1994) the subtraction of the direct mandates from the number of seats to be assigned to a regional list has had a negative result. That is, in a certain region, a party X has had more candidates elected in the single-member constituencies than seats assigned to its regional list after the general calculation. In this case the party in question keeps the seats in excess, and the number of Bundestag members increases accordingly. This is the case of the so-called "excess mandates".



## MALAPPORTIONMENT IN THE GERMAN ELECTORAL SYSTEM

Districting in the German Electoral Legislation.

The German electoral system is a PR system, corrected by a threshold of exclusion, and the upper tier of its complex districting structure is made of a single national constituency. In principle, malapportionment should not be possible in a proportional system with a single national constituency. However, the complex districting system that Germany has, and has had since 1949, allows for some forms of electoral abuse to take place.

The 1949 federal electoral law established that the two tiers of electoral districts were the single-member district and the *Laender*, numbering 11 at that time. The number of seats to be allocated in each region was fixed, and the federal law also laid down that each region should create as many single-member districts as 60% of the total seats to which it was entitled. The same law fixed three general criteria for the formation of single-member districts: first, they had to constitute a "coherent entity"; second, they had to respect as far as possible the administrative subdivisions within each region; third, they had to include a roughly equal number of inhabitants (Art. 20 Federal Electoral Law - FEL- 1949, first indent).

The 1953 electoral law contains interesting innovations for the aspect in which this article is interested. In 1951 the three regions of Baden, Wuerttemberg-Baden, and Wuertemberg-Hohenzollern had unified to become the region of Baden-Wuerttemberg. Therefore, the number of regions (still forming the higher tier of districts - the so-called *Landesproporz*) decreased to nine. More importantly, the number of members of parliament increased to 484 (from 400): this was because the



new law established that the percentage of MPs to be elected directly in single-member districts should be equal to 50% of the *Bundestag* (Pollock 1955). This increase was made in order not to have to review the boundaries of single-member districts, fixed at 242 four years before. Apart from the raising of the threshold of exclusion, from 5% in the single regions to 5% of the (second) votes at the national level (this being the most important innovation of this law, in general), and the introduction of the double vote, the 1953 law must be signalled, in the matter of districting, for the fact that it entails an appendix with a description of all the districts. Districting is in fact, from this moment onwards, brought under the competence of the federal administration (Fuesslein 1957; Jesse 1985).

It was with the electoral law of 1956 that the current system of counting (*Bundesproporz*) was introduced. That is, the regions no longer had a fixed number of seats, and this was established in an intermediate intraparty passage of the general counting (see above). The higher tier of districts was therefore formed by the entire national territory; another innovation of some importance introduced with this law was the increase of the "alternative threshold" from one to three direct mandates (Füßlein 1957). In 1956, the region of Saarland was also returned to Germany, after a period of international administration. This region was divided into five single-member districts: accordingly, the number of single-member districts increased to 247, and the number of MPs to 494.

After the intervention of the Federal Constitutional Court in 1963 (about which see below), the districts have been periodically revised, initially with a law of general revision in 1964. This law also added one single-member district, the number of which thus increased to 248 (corresponding to 496 MPs). This situation remained unchanged

until national reunification, which will be discussed in the last section of the article.

The possibility of malapportionment in the German electoral legislation.

Article 3 of the present federal electoral law treats the rules for districting: this task was allotted to a standing "electoral districts committee" (*Wahlkreiskommission*), composed by the president of the National Statistics Institute, a judge of the Federal Administrative Court, and another five members coming from bureaucratic backgrounds. This Committee has, by law, to submit proposals for modification of the boundaries of electoral single-member districts, in the case of substantial changes of population in the districts, to the *Bundestag*. This is the basic ground for the committee proposals, although the law allows it to present analogous proposals for "other reasons" too (given by the other criteria for districting listed in the same article). However, such proposals are not binding, and the parliament can change or disregard them.

In formulating its proposals, the Committee must take into account some basic criteria, such as the regional boundaries (for the logic of the counting itself), and, as much as possible, the other lower administrative subdivisions; moreover, the Committee should respect the principle according to which the number of districts in each *Land* should correspond roughly to the quota of the population of the *Land* in question in respect to the total population. In addition to this, the law also establishes the principle that "the districts should build an internally coherent entity" Finally, the population of each district cannot deviate from the average population of all the districts by more than 25%.



If the deviation is higher than 33,1/3%, the district must be redesigned (FEL art. 3).

Thus, the phenomenon of malapportionment (disproportionality seats/population) may occur, in the German electoral system, at two levels: first, within each region, with districts entailing different amounts of the population, and, second, between regions, with the allocation to one or more regions of a higher number of single-member districts than they would be entitled to on the basis of their population. It is exactly this second form of malapportionment which in the German system may have effects on the composition of the parliament.

An example of how this can happen is given by the situation following the 1961 federal elections. In this consultation, the CDU had obtained four excess mandates in the region of Schleswig-Holstein, since it had won fourteen single-member mandates and ten list mandates in that region. This result was brought before the Federal Constitutional Court by some electors (as allowed by the law), claiming that at least three of these seats were due to malapportionment (Frowein 1974; Luther 1990). This was because the population of Schleswig-Holstein had strongly decreased in the preceding years, mainly because of the resettlement of those expelled from the Eastern ex-German territories (*Heimatvertriebene*), people who had been settled there shortly after the war.

Therefore, in 1961, the population of each district in Schleswig-Holstein was lower than the national average. Consequently, the region in question entailed a higher number of single-member districts than it should on the basis of its population, since the number of single-member districts had not been revised. This situation led, with a victory of CDU in all single-member districts, to a number of list votes for the same party which only entitled it to a remarkably lower (10 instead of 14) number of seats (Vogel, Nohlen, Schultze 1971).

There is no need to comment here on the decision of the Constitutional Court (Frowein 1974; Luther 1990); it is enough to say that the elections were not annulled, that the Court established that excess mandates cannot be created by districting distortions (not admissible above the limits fixed by the law), but that they are acceptable only as a consequence of the principle of the "personalization" of the vote as this is established by the electoral law itself. However, the *Bundestag* (dating from the 1st January 1962, already before the pronouncement of the Court) corrected the distribution of districts among regions, and assigned only 11 single-member districts to the Schleswig-Holstein instead of 14 (Capoccia 1995).

#### A NEW FORM OF "ELECTORAL ABUSE"? QUASI-MALAPPORTIONMENT AND QUASI-GERRYMANDERING IN THE POST-UNIFICATION ELECTIONS 1990.

##### The electoral system adopted

The electoral system adopted for the first all-German elections stemmed from a very complicated process, in which different subjects intervened, as we will shortly see. The public debate on this matter had oscillated between two poles: the opportunity of having electoral rules which were to be as uniform as possible in all the (new) national territory, and, on the other hand, the necessity of taking into account, also in terms of electoral regulations, the specificity of the Eastern ex-DDR regions (Isensee 1990; Brenner 1991).

After a regulatory intervention —which is not important here— about the elections in West Berlin, the first important step towards the introduction of a new electoral



law in the Eastern regions was the "Electoral Treaty" (*Wahlvertrag*) between the two Germanies, signed and ratified in August 1990. With this document the West German electoral law was simply transferred to the ex-DDR, in which the *Laender* had been formally reconstituted (even if they had not yet elected their parliaments). The only important exception to this— the aim of which was to take into account the objective difficulties that Eastern parties would have in overcoming the 5% threshold at the national level— was the possibility for every Eastern party to connect its second votes to those of a Western party, to count them together and—having overcome the 5% threshold in this way— to thereby manage to win seats in the general distribution. This was called "piggyback procedure" (*Huckepackverfahren*), and was declared to be unconstitutional by the Federal Constitutional Court in September.

In a famous sentence, issued on the 29th September 1990 (N° 20), the Federal Constitutional Court declared that the procedure adopted would affect the equality of chances between parties, since the Eastern parties which did not have the possibility of having a strong Western partner would not have any chance of overcoming the threshold. The unfair treatment of Eastern parties would not be diminished by an adoption of a lower threshold (another proposal in the debate) for the whole national territory. Therefore, the Court established that, for the exceptional circumstances of the first all-German elections, the territory of application of the electoral threshold of exclusion should be split into two regions, each corresponding to one of the two old Germanies. To take part in the distribution of seats, a party should obtain more than 5% of the second votes in either of the two electoral areas. In so doing, it would be entitled to participate in the seat distribution with all its votes, obtained in both areas. This is the most important rule introduced by the Court with this sentence.<sup>3</sup> The parliament



inserted this provision into the modification of the federal electoral law. This modification was to be transitory, adopted only for the first all-German elections in December 1990.

The threshold of exclusion and the German electoral system.

The German electoral system entails two (explicit) thresholds of exclusion: the 5% of valid second votes and three direct mandates in single-member districts. These thresholds were introduced in their present form, respectively, in 1953 and 1956. Formally, the two thresholds are of different "heights", since the so-called alternative clause represents, from a merely numerical viewpoint, a lower obstacle than the other threshold. This lowering is striking, since more than two million votes are necessary to overcome the 5% threshold, whereas roughly 1/8 of this amount would be enough to obtain representation via the alternative threshold (Fuesslein 1956)<sup>4</sup>. Therefore, parties are treated differently by the system according to the territorial dislocation of their votes (and also according to the eventual different choices of the electors with their two votes). An analogous problem will arise in the case of the first all-German elections, as will be seen in what follows.

The first all-German elections, as I said before, take place under an electoral system in which the 5% threshold of exclusion (one of the most characterizing features of the system) is applied in two distinct territories, labelled as *Wahlgebiet West* and *Wahlgebiet Ost* (literally, "Western" and "Eastern electoral area"). This has, on the level of the formal analysis of electoral systems, some interesting consequences.

The results of the elections in question were the following:

Table 1 and Table 2 about here

Taking the lead from the level of turnout which effectively occurred in this election, if the 5% threshold had been applied on the whole national territory, a party would have needed 2,322,789 votes to take part in the seat distribution (I do not consider here the "alternative threshold", for the sake of simplicity). With the "divided" threshold, on the contrary, 1,871,305 votes have been necessary in the Western area, and 451,483 in the Eastern area.

These were the real "thresholds of representation" of the system adopted for the first all-German elections. From a merely theoretical viewpoint, it is evident that the true threshold would be the lower one, namely the Eastern one, with 451,483 votes. From a practical point of view, however, things are rather different, since we have to distinguish between:

1. parties competing in both electoral areas;
2. parties competing only in the Eastern electoral area;
3. parties competing only in the Western electoral area.

The real threshold, then, was the "Eastern" one (451,483 votes) for the parties under 1. and 2., while the parties under 3. had to overcome a threshold of 1,871,305 votes.

Before pursuing the analysis further, it has to be clarified that the territory of application of a threshold of exclusion is not, from a technical viewpoint, to be considered as an electoral district. It does not constitute the "relative ambit" in which the votes are counted, or the "unit of aggregation" for the transformation of votes into seats. Incidentally, different territories of application of the 5% threshold can coexist with different districting structures, as is demonstrated by German electoral history.



In fact, in 1949 the single regions constituted both the higher tier of districts and the territory of application of the 5% threshold; in 1953, the territory of application shifted to the nation, while the higher tier remained that of the regions; in 1957, finally, both the higher tier of districts and the territory of application were given by the nation.

Rather, the division of the territory of application of the threshold can be seen as an alleviation of the obstacle that parties have to overcome, or of a necessary condition that they have to meet, to take part in the seat allocation process. In this sense, it might be seen as being of a similar nature to the provision contained in the electoral law on the basis of which parties representing national minorities are exempted from having to obtain 5% of the national vote to take part in the seat allocation procedure. In this case, the obstacle is removed, and the criterion for this is whether a party represents a national minority; in the case with which we are currently dealing, the obstacle is reduced, and the criterion for this is the territorial dislocation of the parties, their organization and their followers. That is to say, the different treatment for the different parties also depends on the nature of the territorial areas in which they compete, namely, on their boundary and on their size.

This also brings to mind the difference between the two thresholds of the system, as mentioned before: in that case too parties are treated differently according to their territorial dislocation. However, the difference between the 5% and the alternative threshold has been embedded in the complex nature of the German electoral system since it was invented, and is part of its dual formal structure. In the case of the division of the territory of application of the 5% threshold, on the contrary, the different treatment of

different parties occurs within the same part of the system, namely, that of the second votes.

Be that as it may, the point is that the different tailoring of the territories in which a threshold of exclusion is applied can have special consequences on the access of certain parties to representation. Such consequences may occur in every system in which the same threshold of exclusion is applied in different territories, and are in some ways similar to those which may stem from the familiar phenomena of gerrymandering and malapportionment.

I will label the forms of electoral abuse caused by the different tailoring of the territories of application of a threshold of exclusion as "*quasi-gerrymandering*" and "*quasi-malapportionment*". In defining these concepts, I will use examples drawn from the German case which constitutes the object of this paper, but it is obvious that such phenomena may have a generalizable impact, being liable to occur in every system in which the same explicit threshold of exclusion is applied in different territories.

By "*quasi-malapportionment*" is meant the inequality between the territories of application of a threshold in terms of population (or better, of electors). In the case observed, there is a huge quasi-malapportionment, since in the Western electoral area there were 48,128,370 electors (with 37,426,103 valid votes in the 1990 elections), while in the Eastern electoral area the electors numbered 12,308,190 (with 9,029,669 valid votes in the 1990 elections). This means that there is a proportion of four to one between the two areas. Consequently, it can be said that the same amount of votes that a given party gains may or may not be sufficient for it to obtain representation, following its territorial dislocation in one or the other electoral areas.

This was the case, for example, of the *Republikaner*. This party participated in the elections in both *Wahlgebiete*, but



it did not manage to pass the threshold in either of the two. In the Western area it obtained 871,773 votes, corresponding to 2.41% of the votes expressed in that *Wahlgebiet*; in the Eastern area it obtained 115,496 votes, corresponding to 1.3% of the votes expressed there. Let us hypothesize that the same party had had the same votes, but in the opposite areas: 871,773 votes in the Eastern area would have represented 9.65% of the votes expressed there, and therefore the party would have taken part in the seat distribution, obtaining, only for these votes, roughly 12-13 mandates. Furthermore, the votes also obtained in the other *Wahlgebiet* would have been counted (115,496), providing the party with one or two more seats.

A mirror case is provided by the PDS (*Partei des demokratischen Sozialismus* - Party of Democratic Socialism), the heir to the former Socialist Unitary (Communist) party of the GDR. It obtained 1,003,631 votes in the Eastern area (11.1% of the *Wahlgebiet*), and therefore obtained 17 seats, of which one was due to the 109,613 votes that the party gained in the Western electoral area, and which were "dragged" into the counting procedure by the overcoming of the threshold in the Eastern area. It is easy to see how the PDS would not have obtained any seats, had it had the same amount of votes in the opposite areas.

Had the two territories of application of the threshold been equal in terms of population, the phenomenon of "quasi-gerrymandering" would still have been possible. By "quasi-gerrymandering" I mean the artificial tailoring of the territory of application of the electoral threshold, carried out in such a way to favour (or disfavour), on the basis of previous electoral results, a given party, consenting (or preventing) it from gaining representation through the overcoming of the threshold in one of the territories.

Of course, in the case of quasi-gerrymandering we face a phenomenon which is less likely to occur, but which is still



possible. An example, drawn from the elections with which we are dealing, can help us: in the first all-German election, two ecologist parties competed separately in the two *Wahlgebiete* (Greens and Greens/Alliance '90). Let us consider them as electorally equivalent, in the sense that electors do not perceive big differences between them, and would have voted for them in either area they competed (This seems indeed to have been the case. See Kleinert 1992; Veen and Hoffmann 1992; Capoccia 1995). As is evident from table 2, the Eastern Green party overcomes the threshold by 94,987 votes, while the Western Green party fails this objective by 93,110 votes. In short, simulating a situation in which there were no quasi-malapportionment,<sup>5</sup> we could hypothesize a different tailoring of the boundaries of the territories, which, by "moving" 100,000 ecologist votes from one territory to another, would have determined the access or the exclusion of either party from the parliament.<sup>6</sup>

In conclusion, if the threshold of exclusion in an electoral system is the main instrument of distortion/reduction, if the same threshold of exclusion is applied in different territories, and if it is enough to overcome the threshold only in one of those for parties to take part in the process of seat allocation with all their votes, the equality of the territories in terms of population (the *quasi-malapportionment*), as well as (to a lesser extent) the partisan tailoring of the territories (the *quasi-gerrymandering*), are liable to affect access to representation in a way which might be very remarkable. This is what happened, for reasons which were certainly justified by the exceptionality of the situation, in the first all-German elections.

## CONCLUSIONS

The article has dealt with the problem of territorial electoral abuse in the German electoral system. The system in question has a proportional nature, and the main part of the process of seat allocation takes place in a single national district. However, the complexity of the electoral arrangements, and in particular the complex districting of the German system, allow for some phenomena of electoral territorial abuse to emerge which are normally typical of majority systems. Although the impact of such phenomena is not normally of great importance for the political system, these aspects of the system may have remarkable political consequences, as in the case of the 1994 elections.

In Germany, malapportionment can take two forms, which are logically and empirically related to each other: differences in the voting population between single-member districts, and differences in the number of single-member districts in each *Land* in respect to their quota of the total population. If these distortions are present, excess mandates can be awarded to a party in a given election, and this may, in some circumstances, have effects on the general equilibria in the *Bundestag*, as was the case after the last federal elections of 1994.

The particular temporary electoral reform adopted for the first all-German elections of 1990, finally, gives us an example of a new form of electoral abuse, which may stem from the artificial tailoring (for whatever reasons) of the territorial areas in which a threshold of exclusion is applied. These phenomena have been labelled here as quasi-malapportionment and quasi-gerrymandering, and they can be triggered in any electoral system with the characteristics of that used in Germany for the 1990 elections. The political consequences of such legislation can be very striking,

determining —especially in the case of quasi-malapportionment— the inclusion or the exclusion of specific parties from the parliament.



## Tables

Table 1 - Results of the first all-German elections (votes)\*

	Wahlgebiet West		Wahlgebiet Ost		Federal Republic	
	tsd.	%	tsd.	%	tsd.	%
Inhabitants	61,904		16,430		78,334	
Electors	48,128	77.7	12,308	74.9	60,437	77.2
Voters	37,829	78.6	9,167	74.5	46,996	77.8
Invalid votes	403	1.1	137	1.5	540	1.1
Valid votes	37,426	98.9	9,030	98.5	46,456	98.9
CDU	13,278	35.5	3,777	41.8	17,055	36.7
CSU	3,303	8.8	-	-	3,303	7.1
SPD	13,355	35.7	2,190	24.3	15,545	33.5
FDP	3,956	10.6	1,167	12.9	5,123	11.0
Greens	1,778	4.8	10*	0.1	1,788	3.8
Greens/ Alliance '90	13*	0.0	546	6.1	559	1.2
PDS	126	0.3	1,004	11.1	1,130	2.4
DSU	3*	0.0	86	1.0	89	0.2
Republikaner	872	2.3	115	1.3	987	2.1
Die Grauen	311	0.8	75	0.8	386	0.8
ODP	191	0.5	14	0.2	205	0.4
NPD	123	0.3	22	0.2	146	0.3
Others	118	0.3	21	0.2	139	0.3

Source: Gerhard A. Ritter and Merith Neuss, *Wahlen in Deutschland 1946-1991. Ein Handbuch*, Muenchen, Beck, 1991.

\* In the table all parties are inserted which have obtained at least 0.3% of votes in one region. The votes reported in the table under the heading "Voters" are the valid list votes. For further details about the election results, see Capoccia 1995, and Ritter and Niehuss 1991.

\* The Greens (*Die Gruenen*) have competed in the Wahlgebiet Ost only in the territory of East Berlin. In fact, the two halves of Berlin had been reunified into a single *Land*, but for the territory of application of the threshold of exclusion, the two halves belonged to different territories. However, party lists have to be presented at the *Land* level, thus both the ecologist parties competed in the "other" electoral territory only in the city of Berlin. The same goes for the DSU, which competed in the eastern regions.

Table 2 - Results of the first all-German elections (seats)

<b>Seats</b>	<b>10 Western regions</b>	<b>5 Eastern regions</b>	<b>Berlin<sup>+</sup></b>	<b>Federal Republic</b>
CDU	195	61 <sup>*</sup>	12	268
CSU	51	-	-	51
SPD	200	30	9	239
FDP	60	16	3	79
Greens/ Alliance '90	-	7	1	8
PDS	1	13	3	17
<b>Total</b>	<b>507</b>	<b>127</b>	<b>28</b>	<b>662</b>

Source: Gerhard A. Ritter and Merith Neuss, *Wahlen in Deutschland 1946-1991. Ein Handbuch*, Muenchen, Beck, 1991.

<sup>+</sup> Since the seats assigned in the region of Berlin cannot be calculated separately, here a single column for the whole region has been inserted.

<sup>\*</sup> Including 6 excess mandates

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**Note about the legal sources:**

The texts of the laws quoted in the article can be found in the *Bundesgesetzblatt* (Official Journal of the Federal Republic of Germany):

-for the federal electoral law of 1949, see B.G.Bl. 1949, Vol. I, p. 21-24;

-for the federal electoral law of 1953, see B.G.Bl. 1953, Vol. I, p. 470-491;

-for the federal electoral law of 1956, see B.G.Bl. 1956, Vol. I, p. 383-407;

-for the revision of the electoral law in 1990 after the intervention of the Constitutional Court, see B.G.Bl. 1990, Vol. I, p. 2141-2426.

The law of ratification of the "Electoral Treaty" by the (then) West German Bundestag, is contented in the *Bundesgesetzblatt* 1990, Vol. II, p. 822.

The sentences of the Federal Constitutional Court of Germany are collected in the publication "Entscheidungen des Bundesverfassungsgerichtes - abbr. BVerfGE" (Decisions of the Federal Constitutional Court), edited by the justices themselves. The quoted sentences can be found at:

-the sentence of 1963 on electoral districting can be found in BVerfGE, Vol. 16, p. 131 ff.

-the sentence of 1990 on the electoral reform necessary for the first post-reunification elections can be found in BVerfGE, Vol. 82, p. 322 ff.

<sup>1</sup> The German Federal Constitutional Court, invested with the question, has recently reaffirmed the constitutionality of this aspect of the electoral law.

<sup>2</sup> As will appear from the description of the electoral procedure, there can be other two causes of excess mandates besides malapportionment: split voting and the formula used to distribute the seats allocated to each party between its regional lists. The extent of split voting which would result in excess mandates would have to be very big, while normally this has been very limited in German electoral history (Jesse 1988). The d'Hondt formula was adopted to distribute seats among the regional lists of parties until 1985. The d'Hondt is the least proportional PR formula (Lijphart 1986), and therefore in the German context it could favour the regional lists of a party in the larger regions, where it obtained more votes. Consequently, the lists of the smaller regions (or where the party is weak, or where the turnout is remarkably lower) would be underrepresented. This underrepresentation could mean that, in some cases, proportionally less seats were assigned to a regional list of a party in a region in which the party in question had more direct mandates. This eventuality, which was present before 1985 (in 1961 the Constitutional Court was also asked to rule on the constitutionality of this aspect of the electoral law), is now virtually absent, since the Hare-Niemeyer formula, which replaced the d'Hondt one after that date, does not have such a strong effect.

<sup>3</sup> The other important one is the possibility for the ex-DDR parties to form list alliances, something which was forbidden in West Germany.

<sup>4</sup> The Federal Constitutional Court has very recently considered this aspect of the federal electoral law as constitutional. Incidentally, the alternative threshold allowed in 1994 the PDS (Party of Democratic Socialism, the former Communist party of the DDR) to gain representation in the Bundestag, without having to overcome the 5% threshold.

<sup>5</sup> Actually the quasi-malapportionment has some influence also in the case of the two ecologist parties, since the Greens/Alliance '90 gets in parliament with only 546,470 votes, much less than the *Republikaner*, only territorially differently dislocated.

<sup>6</sup> Pushing the example further, we might even say that, in a situation similar to that of the distribution of votes between the two parties like in the first all-German elections, an operation of quasi-gerrymandering which had "moved" 94.000 ecologist votes from one area to the other, would have had the effect of bringing both parties in parliament. However, probably no operation of quasi-gerrymandering could be so precise.